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No. 725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

EUGENE J. KEOGH, *Petitioner,*

v.

THE WASHINGTON POST COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 775

EUGENE J. KEOGH, *Petitioner,*

against

THE WASHINGTON POST COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The petition does not include the text of Rule 56 of the Federal Rules of Civil Procedure, the application of which is involved in this case. In relevant part that Rule reads:

> "(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior

to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing

the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

* * * *

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

COUNTERSTATEMENT OF THE CASE

Eugene J. Keogh, petitioner herein, has been at all relevant times a member of the United States Congress from the State of New York. On December 6, 1962, petitioner filed this action for libel in the United States District Court for the District of Columbia. JA, pp. 6-12. He alleged the existence of defamatory statements of and concerning him in two "columns" written by defendant Drew Pearson and published in about 600 newspapers including the "Washington Post Times-Herald" published by respondent.

The first article was published on December 12, 1961. JA, pp. 18-21; Petition, Appendix D, pp. 25a-28a. It states that the Attorney General of the United States—then Robert Kennedy—was in the embarrassing position of having to "sit in judgment" on a close political ally, Congressman Keogh, following reports that the Congressman was involved in the same judicial scandal which a few months earlier had resulted in the conviction and imprisonment of the Congressman's brother—a judge in the New York State Courts. The article went on to report that the Attorney General, who was

described as "a good Attorney General," had announced that Congressman Keogh was not involved in the bribery scandal. Additionally, the article discussed, among other things, Congressman Keogh's voting record on natural gas legislation and aid to the Spanish Government and his relationship with a registered lobbyist named Charles Patrick Clark.

Petitioner's theory is that the article contains an implication of wrongdoing. There is nothing in the article, however, which "could only be interpreted" as charging that petitioner was involved in the bribery scandal. Petition, p. 3.

The second article was published in February, 1962. JA, pp. 21-25; Petition, Appendix D, pp. 28a-32a. It discussed President Kennedy's then proposed tax legislation. In mentioning Congressman Keogh, among others, the article stated that the Congressman had made a career out of representing special interests and had been urged by a White House representative to support tax reform.

Petitioner's complaint asks for $2,000,000 in damages for the publication of these two articles.

In May and June, 1963, petitioner deposed defendant Pearson. In October, 1964, petitioner took the depositions of three of respondent's employees. In December, 1964, respondent filed a motion for summary judgment in the District Court. No motion was filed by defendant Pearson.

Respondent's motion for summary judgment relied on the rule announced by this Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), that the constitutional guarantees of freedom of speech prohibit a public official from recovering damages for a defamatory falsehood in the absence of clear and convincing proof

by the official that the statement was made with "actual malice", which the Court defined as knowledge or reckless disregard of falsity.

Respondent contended there was no genuine issue of fact on the question of actual malice, relying upon the various depositions referred to above and upon two affidavits filed with the motion, one by respondent's assistant managing editor, Mr. Joseph Paull, and the other by Mr. James Russell Wiggins, the executive vice-president and editor. JA, pp. 94-98. The affidavits affirm that neither of respondent's officials responsible for publication of the articles knew that either article contained any false statement and that neither official had any evidence causing them to suspect prior to publication that the articles contained any false statement. In his deposition Mr. Paull testified that he recalled reading the December 1961 column for newsworthy content, for sense and accuracy, for libelous content and for style, and that after so reading the article he approved it for publication. He could not specifically recall reading the February column but may have done so. It was Mr. Paull's policy, when reviewing articles for publication, to take steps to ascertain the truthfulness of the statements whenever an article contained anything contrary to Mr. Paull's understanding of the facts. JA, p. 75.

Petitioner conceded that the *Times* rule was applicable but opposed the motion for summary judgment with legal argument and his personal affidavit. The affidavit consisted of an attack upon defendant Pearson's past, making a series of allegations that in 1955 Time Magazine published a story charging that a Pearson article of that era was untrue in part; that in 1944 respondent published a retraction of a statement in a

Pearson article published at that time; that in 1948 Time asserted that a 1944 survey of journalists had rated Pearson the tenth most accurate journalist; that Pearson was criticized in a 1949 article in the Saturday Evening Post; that in 1961 Newsweek reported that Pearson was not "considered a 'final source' in Washington"; that Pearson had been attacked in a 1958 article in a newspaper in Alaska; that in 1956 Pearson published certain statements in the Saturday Evening Post about his controversies with various political figures; and that in 1948 Time asserted that Pearson was not asked for his proof by newspaper editors because they knew he would defend libel cases for them. No copy of any document referred to in the affidavit was attached thereto. JA, pp. 99-108.

The District Court denied respondent's motion in March, 1965 with a short memorandum and order. Petition, Appendix B, pp. 2a-3a. On motion for reconsideration, the District Judge filed a more lengthy opinion and, pursuant to 28 U.S.C. § 1292(b), certified that his decision involved a controlling question of law as to which there was a substantial ground for a difference of opinion and that an immediate appeal might materially advance the ultimate termination on the litigation. Petition, Appendix C, pp. 4a-11a; 244 F. Supp. 482. The principal controlling question certified by the trial court, although not articulated with complete clarity, was whether actual malice could be inferred from the face of articles alone, assuming a jury might find the articles contained serious allegations of misconduct which respondent had not verified independently prior to publication. A timely application for leave to appeal pursuant to 28 U.S.C. § 1292(b)

was granted by the United States Court of Appeals for the District of Columbia Circuit in November, 1965.

Of the three depositions of respondent's employees which petitioner took on October 22, 1964, two were completed on that date and the third deposition, that of Mr. Paull, was adjourned without date by petitioner's attorney pending a ruling on the propriety of directions to the witness not to answer certain questions. JA, p. 92. Although the transcript of the deposition was completed shortly thereafter, no motion to compel answers was made until April 26, 1965, six months after the deposition had been adjourned and one month after summary judgment had been denied. JA, pp. 3-4. At no time during any of the District Court proceedings did petitioner's attorney seek to resume the deposition of Mr. Paull or to begin the deposition of Mr. Wiggins, which petitioner had also scheduled for October 22, 1964. At no time did petitioner request or seek a continuance pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to supplement his affidavit, complete the Paull deposition or to conduct any other discovery. Petitioner's motion to compel answers of Mr. Paull was argued in the District Court in August, 1965 at which time petitioner's attorney was directed to file a proposed order that would grant the motion in part and deny it in part. Petitioner's attorney did not file a proposed order until some time after the oral argument in the Court of Appeals in April, 1966.

On July 28, 1966 the Court of Appeals announced its decision reversing the District Court on the denial of summary judgment. The Court of Appeals found nothing in the article itself which, in the light of this

Court's explanations of the *Times* rule, would cause the failure to make an independent verification of the articles constitute evidence of actual malice. The columns in question were found to contain no more serious charges than those in cases in which this Court had found no duty to investigate. The court below held that the seriousness of a charge, by itself, is insufficient to support a finding that publication occurred with knowledge or reckless disregard of falsity. Petition, Appendix D, pp. 19a-20a.

The Court of Appeals further found that petitioner's affidavit was not entitled to consideration because of the failure to comply with Rule 56. One Judge went on to state in the alternative that even if the affidavit had complied with the Rule, it would be insufficient to raise a genuine issue of fact on the question of actual malice.[1]

REASONS FOR DENYING THE WRIT

The decision below is not in conflict with any decision of this Court. It is not in conflict with any decision cited in the petition or known to respondent's counsel of any United States Court of Appeals rendered since *New York Times Co.* v. *Sullivan.*

The decision below *sustains* a claim by respondent of constitutional protection under the First Amendment for published criticism of a United States Congressman—one who is undeniably a public official. Petitioner makes no claim of *denial* of constitutional

[1] The Petition (p. 9) quotes a portion of this alternative statement in a misleading manner so as to suggest erroneously that the quotation is taken from that portion of the opinion in which two judges joined to hold that the mere failure to investigate the article independently was not, standing alone, sufficient evidence of actual malice.

right. He concedes that for present purposes he is a "public official" and that the articles of which he complains are subject to the constitutional rule announced by this Court in the *Times* case.[2]

Stripped of its verbiage and mischaracterizations of the record, the principal point urged in the petition is that this Court should reconsider the definition of actual malice which it has enunciated in five cases in the last two Terms. Petitioner argues that this Court's definition of actual malice goes too far in the direction of restricting libel actions and too far in the direction of promoting unfettered public debate. Petitioner calls upon this Court to renounce the definition of actual malice expressed in *Times* and the four cases that followed, and to accept as the constitutional definition of actual malice the common law test which this Court explicitly rejected in *Henry* v. *Collins*, 380 U.S. 356 (1965).

Petitioner concedes that there is absolutely no evidence to suggest that respondent's employees knew or had any suspicion that the publications in question contained false statements. He argues nevertheless that there is a duty to verify independently "serious charges" before publication, because the "severe repercussions regarding the reputation of the official" if the

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[2] The issues in this case, therefore, are not comparable to the issues in three other cases pending in this Court. Associated Press v. Walker, 87 Sup. Ct. 40, *cert. granted* (question whether *Times* rule applies to comments on retired U.S. general); Curtis Pub. Co. v. Butts, 87 Sup. Ct. 30, *cert. granted* (question whether *Times* rule applies to comment on Athletic Director of State University); Pauling v. Globe-Democrat Pub. Co., No. 522, October Term, 1966 (certiorari petition pending; question whether *Times* rule extends to voluntary participant in public debate).

charges are untrue would entitle a jury to infer the existence of reckless disregard. Petitioner relies upon a series of common law decisions antedating *Times* in which state law, principally in New York, has been interpreted by the lower courts as defining actual malice as "a wanton or reckless indifference to plaintiff's rights." Petition, pp. 12-13.[3]

The test announced by this Court in *Times* is not reckless disregard of *reputation,* but rather publication of a defamatory falsehood

> "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

Subsequently, "reckless disregard" was explained by this Court to mean publication of such false statements with a "high degree of awareness of their probable falsity . . . ." *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

In case after case, this Court has held that the mere fact that a charge was serious—together with a failure

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[3] In the court below, petitioner argued in support of the decision of the District Court that there was a duty to investigate independently serious charges since such charges were *ipso facto* probably false. Apparently that position is now abandoned. As the Court of Appeals pointed out,

> "the seriousness of a charge, in itself, is not probative of recklessness with respect to the truth. The most serious charges, which if anything we have the most reason to avoid deterring, may be made responsibly, with no hint of anything contrary to common knowledge . . . ." Petition, Appendix D, pp. 19a-20a.

As this Court pointed out in *Times,* the Constitution protects all criticisms of public officials, including those which are "vehement, caustic, and sometimes unpleasantly sharp . . . ." 376 U.S. at 270.

to verify independently the truth of that charge—was constitutionally insufficient evidence to raise a genuine issue on the question of actual malice.

In *Times* a jury would have been entitled to infer, as perhaps a jury might be entitled to infer in this case, that the publication in question charged the public official with criminal conduct.[4] Yet the official responsible for accepting the publication in *Times* neither telephoned the listed sponsors of the advertisement to determine whether they had indorsed it nor did he check the accuracy of the advertisement against the news stories in the Times' own files.

Despite the fact that news stories in the Times' own files would have shown the advertisement to be false, this Court held that the failure to discover the misstatements .

> "at most supports a finding of negligence and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at 287-88.

The evidence is no different here. It shows (1) a publication that might be found to be defamatory,[5]

[4] Indeed, the trial court in *Times* charged the jury that the publication was libelous per se.

[5] For purposes of the motion for summary judgment respondent did not raise the argument that as a matter of law the publication could not be found to contain some defamatory innuendo. This is not a concession, as petitioner seems to assert, that as a matter of law the publication *is* defamatory. Unlike the *Times* case, there is absolutely no evidence in the present record that any news stories in respondents' own files would indicate any falsity in the columns in question. While truth was not one of the defenses raised by the motion for summary judgment, it is illuminating to note that in a

(2) a failure to verify independently the truth of that publication, and (3) each of the two newspaper officials charged with reviewing the articles before publication "knew nothing to cause him to believe that anything in it was false." 376 U.S. at 261. The absence of any evidence beyond these facts shows that there is no genuine issue of fact on the question of actual malice.

In *Garrison* v. *Louisiana, supra,* the publication complained of was a charge that there were " '. . . interesting questions about the racketeer influences on our eight vacation-minded judges.' " 379 U.S. at 66. This Court did not suggest that there was a higher duty of investigation due to the seriousness of this utterance. It held that the mere failure to have a "just" or "fair reason" for making the utterance was not constitutionally sufficient to show actual malice. Because error is inevitable in free debate, "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74.

In *Henry* v. *Collins, supra,* the libelous statement constituted the serious charge that the defamed public officials were involved in a "diabolic plot" to deprive the defendant of his civil rights. Consistent with the position of the petitioner in this case, the jury in *Henry* v. *Collins* was charged " '. . . you may infer malice

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companion case the District Court said of the first of the two columns sued upon here:

> "Counsel for the defendant Pearson discussed separately in detail each factual item contained in the article and convincingly demonstrated by reference to depositions, affidavits, and exhibits, that each individual statement was true and accurate." Clark v. Pearson, 248 F. Supp. 188, 191 (D.D.C. 1965).

. . . from the falsity and libelous nature of the statement. . . .' " 380 U.S. at 357. This is precisely the rule petitioner seeks. This Court held that instruction to be in error under the *Times* rule because it would have permitted the jury to find actual malice merely in the intent to inflict harm, whereas *Times* employs the more strict test of calculated use of known falsehood. *Ibid.*

Rosenblatt v. *Baer,* 383 U.S. 75 (1966), is the only case since *Times* in which this Court has suggested there might be sufficient evidence of actual malice to raise a jury question on that issue. The evidence did not consist of a simple failure to verify independently a serious allegation. Rather the evidence consisted of testimony showing that the author of the alleged defamation had been offered, in response to a request in one defamatory publication, the opportunity to investigate the plaintiff's records some twelve days before publishing a further defamation charging that the request had not provoked any response. See *Baer* v. *Rosenblatt,* 203 A.2d 773, 776-78 (N.H. 1964), *reversed,* 383 U.S. 75 (1966).

In *Linn* v. *United Plant Guard Workers of America, Local 114,* 383 U.S. 53 (1966), where this Court applied the principle of *Times* to the context of actions for defamation attacking speech protected by the Labor Act, the suggestion that "grave" defamations should be treated differently from "ordinary" libels was dismissed in a footnote as an inappropriate "artificial characterization." 383 U.S. at 65, n. 7. Contrary to the claim of petitioner that serious charges must be independently verified before publication because of the danger of possible injury to official reputation, this Court said in *Linn*:

"the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth." 383 U.S. at 63.

The lower court decisions relied upon by petitioner are not in conflict with the decision below. In *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965), evidence of actual malice was found where the publisher consciously and intentionally rewrote allegations summarized in a report of the Civil Rights Commission as though those allegations were the Commission's established conclusions of fact. No such reckless rewriting by respondent appears in this record. In *Gilligan* v. *King*, 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (Sup. Ct., Trial Term, N.Y. Cty. 1965), the trial court, applying state rules of procedure, denied a motion to dismiss a complaint alleging actual malice. The defendants did not contend or attempt to show that there was an absence of evidence of actual malice. In the present case, the motion for summary judgment pierced the pleadings and asked whether there was any genuine issue of fact to be tried to a jury.

The facts of record show that use of summary judgment procedure in the present case was entirely appropriate and well within the discretion of the lower courts. Petitioner had ample time for discovery. The motion for summary judgment was made two years after the suit began, more than one year after a four-day deposition of defendant Pearson was completed, and two months after several depositions of respondent's employees were taken. Petitioner unfairly insinuates he was not allowed to complete the deposition of Mr. Paull and that a fourth employee, Mr. Wiggins, was not produced for examination. This is sheer fantasy.

Petitioner's attorney adjourned the Paull deposition indefinitely on October 22, 1964, and expressed no interest in taking the deposition of Mr. Wiggins whose deposition was also scheduled for October 22, 1964, and who was available at that time. No effort was made to complete the Paull deposition or to take Mr. Wiggins' deposition at any time until July, 1966, shortly before the Court of Appeals announced its decision. No effort was made to supplement discovery under the procedure outlined in Rule 56(f), Federal Rules of Civil Procedure. After waiting six months before moving to compel answers of Mr. Paull, petitioner waited another ten months—until after the oral argument in the Court of Appeals—to file an order requested by the District Court which only partially granted the motion to compel answers.

Unless there is to be no end to litigation, the use of summary judgment procedures to test the merits of plaintiff's case was perfectly appropriate here.

The petition suggests that, on the merits, the decision below is in conflict with the decisions of other courts applying the *Times* rule. The only conflict of other lower court decisions is with petitioner's contentions, not the ruling below. Numerous cases have correctly interpreted the *Times* rule as precluding a genuine issue of fact on actual malice when the only evidence was a failure to verify independently what some might read as a serious charge. See *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (C.W.D. Ky. 1965), *appeal pending*, No. 16,999 (6th Cir.); *Arscott* v. *Washington Post Co.*, Civil Action No. 1025-61 (D.D.C. May 20, 1964); *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (1964), *aff'd mem.*, 15 N.Y. 2d 1023, 260 N.Y.S. 2d 29 (1965); *Schneph* v. *New*

York Post Corp., 23 App. Div. 2d 822, 259 N.Y.S. 2d 775 (1965) (*aff'd mem.* N.Y.L.J. Nov. 23, 1964).

In *New York Times Co.* v. *Connor*, No. 22362 (5th Cir. Aug. 4, 1966), the Court found no evidence of actual malice, explaining:

> "All that the evidence reveals is that Salisbury relied on one or two persons for each statement and that some of these people were actively involved in the events which were the subject of the article. This certainly does not constitute 'reckless disregard for the truth.' Although accuracy and objectivity in reporting are goals for which all responsible news media strive, the protection of the First Amendment is not limited to statements whose validity are beyond question or which reflect an objective picture of the reported events. While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." Slip opinion, at 21-22.

In *Pauling* v. *National Review, Inc.* 269 N.Y.S. 2d 11 (1966) the court held the *Times* privilege applicable and dismissed the complaint at the close of plaintiff's case stating:

> "Plaintiff argues that he has shown 'reckless disregard' by the defendants of whether the article 'was false or not'. But all the plaintiff's evidence on this phase of the case amounts to, giving it the most favorable inferences, is that defendants re-

> lied on unreliable sources, and that if they had checked in a reasonable manner, they would have ascertained that their statements were false. Assuming these facts to be true, that is still not a showing of 'reckles disregard of whether it was false or not', in the New York Times v. Sullivan sense.'"

Petitioner in sum attacks not the decision below but rather the *Times* case itself and all the cases following it. Petitioner argues that unless serious charges have been independently verified, a jury is entitled to infer actual malice,[6] and that without such a rule newspapers will employ "persons of invincible ignorance in positions of responsibility" who will never have a suspicion of falsity and therefore will never call for an independent verification. Petition, p. 14.[7] There will be time enough for this Court to deal with such far-fetched hypothetical cases—should one ever arise. In the meanwhile, it suffices to say that newspapers have concerns that lead them to read what is offered for

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[6] The argument contains a bootstrap element which petitioner seeks to slide over by repeatedly characterizing the article as vindictive, cruel, and defamatory. Just as in Rosenblatt v. Baer, *supra*, the columns in the present case contain "no clearly actionable statement." 383 U.S. at 79. A jury would, under the rule advocated by petitioner, first have to find that it accepts the unfavorable interpretation of the publication and then further find that the publisher's failure to adopt the same interpretation and to verify it constituted actual malice.

[7] The petition accuses Mr. Paull of being such a person by insinuating that Mr. Paull testified that at the time of publication he had never heard of Congressman Keogh. Petition, p. 14, n. * When read in context, it is clear that all Mr. Paull was saying was that in 1964 at the time of the deposition he could not recall whether, in 1961, he had heard of petitioner.

publication in addition to the fear of possible libel suits. This Court may reasonably assume that any newspaper employing invincibly ignorant editors would not stay in business for long. More importantly, the duty to verify which petitioner seeks to impose would seriously curtail the very "uninhibited, robust, and wide-open" debate the *Times* rule was intended to promote. 376 U.S. at 270. As Judge Wright effectively stated below:

> "Verification of syndicated news reports and columns is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. . . . We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material. . . . Pearson and his fellow columnists seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips. Verification would be certain to dry up much of the stream of information that finds it way into their hands. Whether or not this would please a number of us is irrelevant. What matters is that a rule requiring verification in the absence of evidence that the publisher had good reason to suspect falsity would curtail substantially a protected form of speech." Petition, Appendix D, pp. 24a-25a.

Awareness of the basic premise of the *Times* decision, and of the interpretation and several explanations of that decision by this Court, led the court below to order summary judgment after finding that no genuine issue of fact existed.[8] The court was mindful also of this Court's admonitions regarding the care to be exercised in employing summary judgment (see Petition, Appendix D, pp. 14a-16a) and made its decision only after a careful review of the facts and law. There is no sound reason for disturbing that decision.

* * * *

In addition to his principal contention that the *Times* definition of actual malice should be modified, petitioner argues that a genuine issue of fact was raised by the affidavit he filed in the District Court.

The District Court placed no reliance on this affidavit in its final opinion. If it had relied upon the affidavit, it surely would not have certified as a controlling question of law the issue whether the article on its face could be taken as evidence of malice. The Court of Appeals held that the affidavit was inadmissible because it did not conform to the requirements of Rule 56(e) in that (1) it was not based upon personal knowledge, (2) it did not set forth facts admissible in evidence and (3) there were no sworn or certified copies of any of

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[8] Another "reason" offered by petitioner for changing the *Times* standard is that there should be a higher duty to investigate the works of a syndicated columnist *because* under local law the newspaper is not held vicariously liable for the columnist's actions. It suffices to note that no higher duty was imposed in *Times* where an advertiser was involved and for whom the newspaper would have no vicarious responsibility.

the various documents referred to in the affidavit attached thereto.

As Judge McGowan correctly noted, the ruling by the Court of Appeals that the affidavit was not entitled to consideration obviates the need to rule on the further question of whether, under the *Times* principle, the affidavit gave rise to a genuine issue of fact. Accordingly, unless the ruling on the affidavit by the Court of Appeals is erroneous, which it clearly is not, this Court has no occasion to resolve the question whether a few unproved charges against a columnist, some as many as 20 years old and none of which were shown to be within the knowledge of respondent's officers at the time of publication of the columns in question, raise a genuine issue of fact on the question of actual malice.[9]

Clearly there is no occasion to review the question of whether the affidavit violates Rule 56(e). Petitioner has offered no excuse for the failure to comply with the rule. The insistence of the District Court and of the Court of Appeals on procedural regularity hardly raises an issue this Court ought to review. And unless that question is reviewed, there is simply no occasion to proceed further.

With regard to the failure to comply in other respects with Rule 56(e), petitioner argues that (1) the hearsay

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[9] If this question were to be reached, the reasoning expressed in Judge Wright's alternative statement is surely most persuasive. When all is said and done, petitioner's argument is simply that it is per se evidence of actual malice to publish *anything* by Drew Pearson without independent verification, the asserted reason being that Pearson is controversial. Surely Pearson's controversies, some 15 in the affidavit out of a journalistic career of over 30 years and 11,000 columns, cannot deprive his statements of the same constitutional protection that is accorded more timid columnists. *Cf.* Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

in the affidavit was admissible as evidence of reputation and (2) the supposed statements of Pearson quoted in the affidavit were admissible as admissions by a party. These contentions raise questions regarding the local District of Columbia law of evidence, and hence do not call for this Court's time. They are, morever, completely devoid of merit. The alleged admissions of defendant Pearson would not be admissible against the Post. The asserted specific acts of supposed inaccuracy in remote years in Pearson's past—involving matters wholly unrelated to the present case—are not admissible evidence. *E.g.*, 1 Wigmore, *Evidence* § 64 (3d ed. 1940); McCormick, *Evidence*, § 155 (1954).

Petitioner makes a scattering of other arguments, together with numerous unfair characterizations of the record that approach serious misstatements of the facts.[10] No extended reply seems necessary.

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[10] To cite but one example, in arguing that respondent had no "standard at all" for deciding whether to publish syndicated columns, petitioner cites certain testimony by one employee who petitioner's attorney well knows had no editorial responsibility—that responsibility being vested in Messrs. Wiggins and Paull. See Petition, p. 13, n. *. See J.A., pp. 60, 75, 95, 97. The employee quoted out of context by petitioner further testified that while his delegated function was not reading for accuracy, he would not pass a story which contained anything he recognized to be untrue. See J.A., p. 70.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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